CORRECTED COPY

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 1 1958
JAMES R. BROWNING, Clerk

No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN LEE, PETITIONER

v.

PAUL J. MADIGAN, WARDEN, FEDERAL PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
W. WILSON WHITE,
Assistant Attorney General,
HAROLD H. GREENE,
D. ROBERT OWEN,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes Involved	2
Statement	3
Summary of argument	5
Argument:	
I. Article 2 (e) of the Articles of War is constitutional	8
A. This Court has already held Article 2 (e) constitutional	9
B. If the Court reconsiders the problem, it should again sustain Article 2 (e)	13
II. Petitioner's offense was not committed "in time of peace"	33
A. This Court has already held that "time of peace" for the purpose of Article 92 does not exist until complete peace is officially declared	35
B. "Time of peace" for Article 92 still means complete peace officially declared, and that event did not occur with respect to World War II until April 1952	38
Conclusion	52

CITATIONS

Cases:

Carter v. *McClaughry*, 183 U. S. 365 ..... 18, 19, 20
Chastleton Corporation v. *Sinclair*, 264 U. S. 543 33
Coleman v. *Tennessee*, 97 U. S. 509 ..... 19, 34
Craig, In re, 70 Fed. 969 ..... 16, 18, 19
Duncan v. *Kahanemoku*, 327 U. S. 304 12
Dynes v. *Hoover*, 20 How. 65 35
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146 .. 34, 38
Hurley v. *Crawley*, 50 F. 2d 1010 32

Cases—Continued

	Page
Johnson v. *Sayre*, 158 U. S. 109	34
Kahn v. *Anderson*, 255 U. S. 1	5, 7, 9, 10, 11, 20, 21, 22, 35, 36, 37, 38, 49
Knauff v. *Shaughnessy*, 338 U. S. 537	39, 46
Ludecke v. *Watkins*, 335 U. S. 160	34, 39, 40, 51
McDonald v. *Lee*, 217 F. 2d 619, certiorari granted and remanded with directions to dismiss as moot, 349 U. S. 948	23, 26
McElrath v. *United States*, 102 U. S. 426	38
Milligan, Ex parte, 4 Wall. 2	35
Mitchell v. *Cohen*, 333 U. S. 411	32
Mosher v. *Hudspeth*, 123 F. 2d 401, certiorari denied, 316 U. S. 670	22
Mosher v. *Hunter*, 143 F. 2d 745	22
Reid v. *Covert*, 354 U. S. 1	5, 10, 11, 12, 13, 34
Screws v. *United States*, 325 U. S. 91	38
Stewart v. *Kahn*, 11 Wall. 493	34
Toth v. *Quarles*, 350 U. S. 11	5, 10, 11, 12, 20, 23, 34
United States v. *Ayers*, 4 U. S. C. M. A. 220, 15 C. M. R. 220	49, 50
United States v. *Hendee*, 124 U. S. 309	32
United States v. *Mouat*, 124 U. S. 303	32
United States v. *Shell*, 7 U. S. C. M. A. 646, 23 C. M. R. 110	50
United States v. *Speller*, 24 C. M. R. 173	20
Wildman, Ex parte, 29 Fed. Case No. 617, 53a (D. Kan.)	16, 19, 31
Woods v. *Miller*, 333 U. S. 138	39
Yamashita, In re, 327 U. S. 1	34
Youngstown Sheet & Tube v. *Sawyer*, 343 U. S. 579	33

Constitution and Statutes:

U. S. Constitution:	
Article I, Section 8, Clause 14	8, 34
Fifth Amendment	8, 13, 34
Sixth Amendment	8, 13
Act of March 3, 1873, 17 Stat. 582, Section 12	14, 15, 16–18, 21
Act of June 18, 1898, c. 469, 30 Stat. 483	21, 28, 30

Constitution and Statutes—Continued
Page
Act of March 4, 1915, c. 143, Section 2, 38 Stat. 1085 (10 U. S. C. (1946 ed.) 1456) 24
Articles of War, as amended by Act of June 24, 1948, c. 625, 62 Stat. 604, Sections 202, 235 ..... 2, 31
2 (d), 48, 58, 59, 74–79, 104, 119 45
2 (e) (10 U. S. C. (1946 ed.) 1473 (e)) 2, 5, 8, 9, 13, 15, 23, 29, 30, 32
39 (10 U. S. C. (1946 ed.) 1510) 45
42 (10 U. S. C. (1946 ed.) 1513) 45
45 (10 U. S. C. (1946 ed.) 1516 ..... 29, 45
52 (10 U. S. C. (1946 ed.) 1524 30
53 (10 U. S. C. (1946 ed.) 1525) 47, 48
61 (10 U. S. C. (1946 ed.) 1533) 26
65 (10 U. S. C. (1946 ed.) 1537) 26
70 (10 U. S. C. (1946 ed.) 1542) 45
85 (10 U. S. C. (1946 ed.) 1557) 45
86 (10 U. S. C. (1946 ed.) 1558) 45
80, 81, 82 45
92 (10 U. S. C. (1946 ed., Supp. IV) 1564) 3, 7, 8, 33, 35, 37, 38, 43, 45, 46, 47, 48, 51, 52
Revised Statutes, Section 1361 21
18 Stat. 48 14
39 Stat. 650 31
41 Stat. 787 31
41 Stat. 1359 40
61 Stat. 449 45
61 Stat. 1048 44
66 Stat. C31 46
67 Stat. C24 47
Uniform Code of Military Justice, 10 U. S. C. 801, *et seq.*:
Article 2 (7) (10 U. S. C. 802) 8, 29
Article 56 29
Article 89 26
10 U. S. C. (1946 ed.) 1457 24
10 U. S. C. (1946 ed., Supp. IV) 1484 29
10 U. S. C. (Supp. V) 3662–3663 24
50 U. S. C. § 740 (1952 ed.) 48
Legislative Material:
59 Cong. Rec. 7747, 7805, 7808 40
60 Cong. Rec. 290 41
91 Cong. Rec. 8377 46

Legislative Material—Continued Page
91 Cong. Rec. 8380 46
Hearings before Subcommittee No. 4 of House Committee on Judiciary, on Cessation of Hostilities, Termination of the War and Emergencies:
79th Cong., 1st Sess. (1945) 42, 43
79th Cong., 2d Sess. (1946) 42
Hearings before the Subcommittee of the House Committee on Armed Services on H. R. 2575, To Amend the Articles of War, etc., 80th Cong., 1st Sess., 2121, (1947) 47
Hearings before Subcommittee No. 1 of the House Committee on Armed Services, Uniform Code of Military Justice, 81st Cong., 1st Sess., 1215 (1949) 48
H. J. Res. 327, 66th Cong., 2d Sess 40
H. J. Res. 382, 66th Cong., 3d Sess 40
H. Doc. 119, 55th Cong., 2d Sess., p. 3 ..... 21, 28, 44
H. Doc. 282, 79th Cong., 1st Sess 45
H. Ex. Doc. 61, 41st Cong., 2d Sess., pp. 1–3 14
H. Ex. Doc. 73, 42d Cong., 2d Sess 14
H. Ex. Doc. 19, 43d Cong., 1st Sess., p. 17 15
H. Rep. 70, 42d Cong., 2d Sess 14
H. Rep. 2132, 54th Cong., 1st Sess., p. 2 ..... 27, 29, 31
H. Rep. 224, 55th Cong., 2d Sess., p. 2 ..... 28, 31
H. Rep. 1111, 66th Cong., 3d Sess 40
H. Rep. 2682, 79th Cong., 2d Sess., p. 2 43
H. Rep. 799, 80th Cong., 1st Sess., App. p. 24 45
S. Doc. 42, 80th Cong., 1st Sess 44, 45
S. J. Res. 123, 80th Cong., Section 3 ..... 44, 46, 47, 50
S. Rep. 130, 64th Cong., 1st Sess., App 37, 44
S. Rep. 706, 66th Cong., 3d Sess 41
S. Rep. 339, 80th Cong., 1st Sess., Part 2 45
Miscellaneous:
1 Bull. J. A. G. 100 26
6 Bull. J. A. G., March–April, 1947, § 423 (1), p. 66 26
5 Bull. J. A. G., April 1946, § 419 (2), p. 93 26
12 Fed. Reg. 1 44
Library of Congress Legislative Ref. Serv. Pub. Aff. Bull. No. 35 (1945) 43, 45
16 Op. Atty. Gen. 292 21
32 Op. Atty. Gen. 505 41
Winthrop, *Military Law and Precedents* 105 (Reprint 1920 ed.) 21

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 42

JOHN LEE, PETITIONER

v.

PAUL J. MADIGAN, WARDEN, FEDERAL PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 33–40) is reported at 248 F. 2d 783. The opinion of the District Court (R. 28–31) is reported at 148 F. Supp. 23.

JURISDICTION

The judgment of the Court of Appeals was entered on October 11, 1957 (R. 40). The petition for a writ of certiorari was filed on December 10, 1957, and was granted on March 17, 1958 (R. 41). 356 U. S. 911. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a dishonorable discharge imposed upon a soldier by a previous court-martial sentence severs his connection with the military so as necessarily to deprive military tribunals of the jurisdiction provided by Article 2 (e) of the former Articles of War for offenses committed during confinement in a military disciplinary barracks by all persons under sentence adjudged by courts-martial.

2. Whether the limitation contained in Article 92 of the Articles of War, which deprived courts-martial of jurisdiction of the offense of murder committed in "time of peace," within the continental United States, was operative on June 10, 1949, the time petitioner committed the offense.

STATUTES INVOLVED

The pertinent provisions of the former Articles of War, as amended by the Act of June 24, 1948, c. 625, Sections 202, 235, 62 Stat. 604, 628, 640, provide as follows:

> ART. 2 [10 U. S. C. 1473 (1946 ed.)] *Persons subject to military law.* The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles:
>
> * * * * *
>
> (e) All persons under sentence adjudged by courts martial;
>
> * * * * *

ART. 92. [10 U. S. C. 1564 (1946 ed. Supp. IV.] *Murder; Rape.* Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided,* That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

STATEMENT

On May 27, 1946, while the petitioner, John Lee, was serving in the United States Army overseas he was convicted by a general court-martial of robbery and assault and sentenced to a dishonorable discharge and twenty years in confinement (R. 11). The discharge was executed (R. 12, 33). Thereafter, while interned in the Army's disciplinary barracks at Camp Cooke, California, he committed the offense of murdering another prisoner on June 10, 1949, and was tried by general court-martial under Article 92 for murder (R. 3, 12, 30), convicted, and sentenced to death (R. 3-4). The sentence was reviewed by the Staff Judge Advocate and approved by the convening authority on November 17, 1949 (R. 15). The record of the trial was reviewed by the Board of Review on March 29, 1950, and by the Judicial Council on July 20, 1950, and found legally sufficient to support the

findings and the sentence (R. 16). On October 4, 1950, the Judge Advocate General of the Department of the Army concurred in the opinions of the subordinate bodies and forwarded the record to the President of the United States who, on October 9, 1950, commuted the sentence to confinement at hard labor for life and ordered it to be carried into execution (R. 16).

On October 18, 1954, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, alleging that the murder sentence was invalid because imposed by court-martial after he had already been discharged. The District Court dismissed the petition as premature (on the ground that petitioner was still serving his robbery sentence) and the Court of Appeals for the Ninth Circuit affirmed, 225 F. 2d 674 (C. A. 9), certiorari denied, 350 U. S. 967. On September 20, 1956, the Army Clemency Board remitted the unexpired portion of petitioner's first (robbery) sentence (R. 10), and as a result petitioner thereafter was in custody only under the life sentence for murder. On October 15, 1956, petitioner filed a new petition for a writ of habeas corpus in the United States District Court for the Northern District of California, again attacking the jurisdiction of the court-martial which convicted him (R. 1, 3–9). After a hearing, the District Court dismissed the petition (R. 28–31). On appeal, the Court of Appeals for the Ninth Circuit affirmed (R. 33–40).

SUMMARY OF ARGUMENT

I

Article 2 (e), which provides for courts-martial jurisdiction over persons held in confinement under sentence adjudged by a court-martial, is not unconstitutional as applied to a dishonorably discharged soldier confined at a military disciplinary barracks.

A. In 1921, this Court sustained Article 2 (e) against the same attack as that levied by petitioner. *Kahn* v. *Anderson*, 255 U. S. 1, unanimously upheld the statute in a factual setting the same as that here involved. And the vitality and validity of the *Kahn* ruling have not been undermined by the subsequent decisions in *Toth* v. *Quarles*, 350 U. S. 11, and *Reid* v. *Covert*, 354 U. S. 1. *Toth* expressly recognized *Kahn* (350 U. S. at 14), and *Covert* dealt with the significantly different problem of overseas court-martial jurisdiction over civilian dependents for capital crimes. Neither the holdings nor the theory of those recent cases govern the present problem. *Kahn* stands undisturbed.

B. If the Court should reexamine the validity of the statute, the decision in *Kahn* should be reaffirmed. The substance of Article 2 (e) has been on the statute books since 1873. Congress has five times reenacted the provision—in 1898, 1916, 1920, 1948, and 1950. Its constitutionality has been sustained throughout its history, by this Court and the lower federal courts.

Moreover, the reasons supporting the legislation are as valid today as they were when *Kahn* was decided. The military prisoner is so intimately connected with

the military establishment that it is appropriate for Congress to continue to subject him to court-martial jurisdiction. For one thing, he continues in a full military environment, and there is clearly no break between him and the military for disciplinary purposes. It would be incongruous and disruptive to make a distinction, for disciplinary purposes, between the military prisoner whose dishonorable discharge has been executed, and the one who merely receives a term of confinement or whose discharge has been suspended during confinement. Another significant factor is that military prisons are operated on military lines for the very purpose of rehabilitating the prisoners—both those without discharges and those already discharged—as full-fledged soldiers, if at all possible. The sum of it is that a military prisoner, even though discharged, can still be fairly viewed as in and a part of the military establishment for court-martial purposes.

The dishonorable discharge can also be viewed as not even technically severing the serviceman from his service until the completion of his prison term. This is an appropriate view of the total Congressional scheme. On the one hand, Congress has specifically subjected dishonorably discharged prisoners in confinement to the Articles of War, and on the other it permits the imposition of a dishonorable discharge as a mode of punishment. The two provisions can properly be construed to postpone the full effect of the discharge until completion of the term of confinement. On that view, petitioner was formally still in

the service when he committed the offense at Camp Cooke.

II

Petitioner was lawfully tried and convicted of the offense of murder under Article 92 which restricts the jurisdiction of courts-martial for this offense to "time of peace." Our position is that when petitioner committed the offense on June 10, 1949, "time of peace" did not yet exist, as that phrase is used in Article 92.

It is important to keep in mind that the question here involved is but one of interpretation of statutory language, not of constitutionality. The power of Congress to provide for this type of court-martial jurisdiction, whether in time of peace or in time of war, cannot be doubted. In *Kahn* v. *Anderson, supra,* this Court also authoritatively construed Article 92. It was there decided that the limitation of the Article becomes operative only after peace is officially declared by the political branches of the Government. At what point officially declared peace occurred after World War II must be determined by examining the actions of the political branches of the Government. Both the Executive branch and the Congress have made it clear that in their view wartime legislation continued to be effective until the formal state of peace arrived on April 28, 1952, with the coming into effect of the peace treaty with Japan. Prior to that time, a limited number of wartime statutes (including other Articles of War) were expressly and selectively terminated or repealed; but not Article 92. It is abundantly clear, from the approach used by Congress with respect to World War II, that all wartime legislation not specifi-

cally terminated was intended to remain effective until the conclusion of the final peace treaty or formal declaration of peace. Article 92 should not be deemed excluded from that pattern.

ARGUMENT

I. ARTICLE 2 (c) OF THE ARTICLES OF WAR IS CONSTITUTIONAL

Petitioner contends that Article 2 (c) of the Articles of War (*supra*, p. 2)—giving courts-martial jurisdiction over military prisoners even after they have been dishonorably discharged from the service [1]—is unconstitutional in that it deprives him of the civilian guarantees of the Fifth and Sixth Amendments. Article I, section 8, clause 14 of the Constitution provides that Congress shall have the power "To make Rules for the Government and Regulation of the land and naval Forces," and the Fifth Amendment provides for indictment by the grand jury "except in cases arising in the land or naval forces." [2] Therefore, the basic question is whether a person who is serving, in a military prison, a term of confinement (lawfully imposed by a court-martial) under an executed sentence of dishonorable discharge is to be considered a member of the land and naval forces during

---

[1] Article 2 (7) of the Uniform Code of Military Justice provides for court-martial jurisdiction of "persons in custody of the armed forces serving a sentence imposed by a court-martial." The present case arose before the enactment of the Uniform Code.

[2] One not in the land or naval forces would of course also be entitled to the Sixth Amendment guarantee of a jury trial.

his term of imprisonment so as to render him amenable to court-martial jurisdiction for offenses committed during his confinement.

This question cannot be answered simply by reciting that one who has been given a dishonorable discharge is necessarily a civilian. Such an answer—which is that assumed in petitioner's brief—is merely a restatement of a result. But this is not the result which emerges from the precedents and the realities.

A. THIS COURT HAS ALREADY HELD ARTICLE 2 (c) CONSTITUTIONAL

1. Some thirty-eight years ago, two years after the armistice which closed actual hostilities in World War I, this Court considered the precise question of the validity of Article 2 (c), and squarely and unanimously upheld it. In *Kahn* v. *Anderson*, 255 U. S. 1, the constitutionality of Article 2 (c) was before the Court in circumstances strikingly similar to those presented here. The petitioners had committed offenses while they were in confinement in a military prison as punishment for previous crimes against military law. They were tried by a court-martial and convicted. Petitions for writs of habeas corpus were denied, and this Court affirmed. There was some question as to whether the prisoners had sufficiently alleged a prior discharge from the service imposed by virtue of the sentences upon the original offenses, but the Court held that this was immaterial.[3] Since it was con-

[3] The Government's brief in the *Kahn* case conceded that the prisoners had alleged that they were "not members of or serving as soldiers in the Army" and "were discharged from the Army" prior to committing the offense. Brief for appellee in No. 421, October Term 1920, p. 7.

ceded that at the time of the second trial the petitioners were military prisoners, it made no difference in the opinion of the Court whether or not they had been discharged, for as prisoners "they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment" (255 U. S. at 7–8). This holding directly resolved the question presented here. And a holding it was, notwithstanding petitioner's view that the statement was dictum. Only because it made no difference whether or not the prisoners had been discharged was the Court able to dispose of the case as it did. If prisoners once discharged ceased to be subject to military jurisdiction, then the Court would have had to determine the true facts before it could render its decision. It was necessary either to determine the sufficiency of the allegations as to prior discharge, or to give the prisoners the benefit of any doubt and assume such allegations to be adequate, and then decide the case on that basis. It is apparent that the Court chose the latter alternative, and accordingly the decision has been viewed as a square holding ever since 1921.[4]

2. Petitioner asserts that in any event *Kahn* was overruled when this Court decided *Toth* v. *Quarles*, 350 U. S. 11, and *Reid* v. *Covert*, 354 U. S. 1. This position appears to be mainly based on the fact that the opinions in the latter two cases provide a rather

[4] This Court, in the recent *Toth* case, certainly did not consider the quoted language from *Kahn* to be dictum when it referred to it as a holding (350 U. S. at 14).

thorough historical analysis of military-civilian relationships while the *Kahn* opinion disposed of the issue more briefly. That the more succinct handling of the matter in *Kahn* does not diminish its value as a precedent is obvious.[5] And neither in *Toth* nor in *Covert* did the Court cast doubt on the continuing vitality of the *Kahn* ruling. In fact, the one reference to *Kahn* plainly supports the position of respondent. In *Toth*,[6] the Court stated with evident acceptance (350 U. S. at 14):

> This Court has held that the Article I clause just quoted authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses. Later it was held that court-martial jurisdiction could be exerted over a dishonorably discharged soldier then a military prisoner serving a sentence imposed by a prior court-martial [citing *Kahn* v. *Anderson* in a footnote; one other footnote omitted].

This comment was made to distinguish what seemed to the Court legitimate cases of exercise of military jurisdiction from the unwarranted extension of court-martial power over one *"who had severed all relation-*

---

[5] Since petitioner labors this point, it may not be amiss to point out that one of the arguments used to attack the constitutionality of Article 2 (c) in *Kahn* was that the history of the civilian jury trial safeguards demonstrated that Article 2 (c) was in conflict with the Constitution. See Brief for Appellants, No. 421, October Term 1920, pp. 23–31. The Court was certainly not oblivious to this history.

[6] The opinions in *Covert*, 354 U. S. 1, mention neither *Kahn* v. *Anderson* nor the problem with which it deals.

ship with the military and its institutions" [350 U. S. at 14; emphasis added].

Nor does the general theory of either *Toth* or *Covert* govern the present problem. Petitioner asserts that in those cases the Court held that there are only two classes of persons: (1) those who have been mustered or enlisted into the land or naval forces, and have not been discharged, and (2) all others, who are civilians and therefore not subject to court-martial. But neither *Toth* nor *Covert* so holds or intimates. Of *Toth*, we have already spoken; unlike that petitioner, this petitioner has plainly not "severed all relationship with the military and its institutions." In *Covert*, the opinion of Mr. Justice Black, concurred in by three other Justices, explicitly recognized that the boundary between "civilians" and "members of the 'land and naval forces'" was not a clear one, and indicated that the latter category might include a person who had not been formally inducted into the military or did not wear a uniform (354 U. S. at 22–23).[1] Mr. Justice Frankfurter, concurring, spoke in terms of physical and social proximity as determining whether a person is encompassed in the land or naval forces category for court-martial purposes (354 U. S. at 46). Mr. Justice Harlan, likewise concurring, was emphatic in his view that under

[1] See also *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313–314, where the Court stated: "Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." (Footnotes omitted.)

Article I military jurisdiction extends beyond those in actual service as soldiers in the armed forces (354 U. S. at 70–71).

And beyond these statements, the actual holding in *Covert* leaves open the possibility that even civilian dependents who commit non-capital offenses overseas may be held to be members of the land or naval forces for court-martial purposes. The narrow ruling was no more than that wives, children and other dependents of servicemen who commit capital offenses outside the United States are not comprised within the group excepted from the benefits of the Fifth and Sixth Amendments.

In any case, it is clear that neither the Court as a whole nor any of its members has gone as far as petitioner claims. The Court did not decide or suggest in either *Toth* or *Covert* that all those who had historically been subject to court-martial jurisdiction except those still remaining in actual military units were now exempt from military trials.

B. IF THE COURT RECONSIDERS THIS PROBLEM, IT SHOULD AGAIN SUSTAIN ARTICLE 2 (c)

If the Court should wish to reconsider the problem *de novo*, we submit that Article 2 (c) still withstands attack. The principles of the *Kahn* decision not only rest upon a solid historical foundation but they retain as much vitality today as they had in 1921.

1. Prior to the Civil War, Congress had no occasion to deal with the problem of the status of soldiers serving a military sentence; apparently the disciplinary problem had not yet become acute. However, in the

early 1870's, the need for the establishment of a unified system of military prisons became apparent. Not only was the corrective aspect of a prison system recognized, but also facilities for handling and segregating prisoners were needed to prevent needless details from the ranks to furnish personnel to man the guardhouses in the regiments and on the posts. Additionally, the usual remedy of discharge as a means to eliminate undesirables had proved ineffective, for often they would re-enlist under another name. H. Ex. Doc. No. 61, 41st Cong., 2d Sess., pp. 1–3. What was needed were facilities where military prisoners could be under complete military control and under the supervision of a trained prison staff until the service of their sentence was completed.

After an extended study of the military prisons in Canada, a report was submitted to Congress concerning this matter. H. Ex. Doc. No. 73, 42d Cong., 2d Sess. Congress recognized the need and considered appropriate legislation. See H. Rep. No. 70, 42d Cong., 2d Sess. The statute ultimately enacted established one military prison,[4] and it subjected all persons confined in that prison, under court-martial sentence, to continued court-martial jurisdiction. Act of March 3, 1873, 17 Stat. 582. Specifically, Section 12 of the Act of 1873 provided:

> That all prisoners under confinement in said military prisons undergoing sentence of courts-martial, shall be liable to trial and punishment

[4] Initially to be in Rock Island, Illinois, but subsequently placed at Fort Leavenworth, Kansas. See 18 Stat. 48, Ch. 186.

by courts-martial under the rules and articles of war for offences committed during the said confinement.[9]

Thus, very significantly, from the very inception of the organized military prison system Congress felt it advisable and necessary to provide for continuing military jurisdiction over those who were serving sentences in those prisons. This cardinal fact sheds much light upon our problem, for the constitutional question basically depends, at least in part, upon a resolution of the pragmatic and historical issue of whether or not persons like this petitioner can fairly be said to be encompassed within the concept of land or naval forces. While the ultimate resolution of that question is of course for the Judiciary, it is not insignificant that the Congress has assumed, at least since shortly after the Civil War, that court-martialed prisoners do not become so detached from the land or naval forces as to escape their jurisdiction. Article 2 (e) and its forbears have been continuously on the books since 1873.[10]

---

[9] A classification system was set up pursuant to the statute, the character of the offense and the sentence of the prisoner being among the criteria used. One class encompassed prisoners who had been sentenced to be dishonorably discharged from the service and to subsequent imprisonment for long periods for aggravated offenses. H. Ex. Doc. No. 19, 43d Cong., 1st Sess., p. 17.

[10] After the 1873 Act came the 1898 Act (see footnote 14, *infra*, p. 21), and then the adoption of Article 2 (e) in 1916, and again in 1920, and again in 1948. The Uniform Code of Military Justice continued the policy (see footnote 1, *supra*, p. 8). Thus, six different Congresses have affirmatively adopted the provision.

2. (a). The Act of 1873 was upheld from the very beginning. *Ex parte Wildman*, 29 Fed. Cas. (No. 17,653a, D. Kan.), the first case in which the constitutional issue was raised, was identical with the instant case in its operative facts. There, as here, a soldier was tried by court-martial and sentenced to imprisonment and to a dishonorable discharge. While serving his term of imprisonment, after the discharge had been executed, he committed other offenses and was again tried and convicted by court-martial. His petition for a writ of habeas corpus was denied, and the court upheld the constitutionality of the statute on the ground that (1) it was based on the valid proposition that, in order to secure discipline and good order and to protect the public service, military tribunals should be allowed to exercise jurisdiction over persons who have the kind of a relationship to the service which exists between a military prisoner, albeit technically discharged, and the branch in which he serves, and (2) Congress in effect provided that a dishonorable discharge, when coupled with a term of imprisonment, was not to become effective in the sense of breaking the bonds between the service and the prisoner until the sentence was completely served.

Subsequent decisions are to the same effect. In *In re Craig*, 70 Fed. 969 (C. C., D. Kan.), where the constitutionality of Section 12 of the Act of March 3, 1873, was again at issue, the court held:

> The prison in question was designed as a place of punishment for those persons only who, while in the military service of the government, either as enlisted men or otherwise, are guilty

of offenses "against the rules, regulations and laws for the government of the army of the United States." It is a part of our military establishment, as much as the guardhouse, with which our forts and military encampments are always provided. * * * There can be no doubt of the fact that the prison was thus placed in charge of army officers because it was regarded as a military institution, the same as a fort or an arsenal or a navy yard, and for the purpose of subjecting persons who might be confined therein to military law and to the same discipline that is enforced in the army.

Much stress, however, is laid on the fact that when the offense for which Craig was tried and convicted was committed, he had been discharged from the army, and was no longer subject to military law or discipline. This contention overlooks the fact that the discharge was issued in part execution of a sentence which directed that he should not only be dishonorably discharged, with the forfeiture of all pay and allowances, but that he should also be held and confined at hard labor for a given period in a miltary prison. A discharge executed under these circumstances and for such a purpose cannot be said to have had the effect of severing his connection with the army, and of freeing him forthwith from all the restraints of military law. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under sentence of a court-martial, for the purpose of enforcing discipline and punishing him for desertion, he remained subject to military law, which prevailed in the prison where he was

> confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was so held."

In *Carter* v. *McClaughry*, 183 U. S. 365, this Court for the first time had the opportunity to speak on the subject of the status of one dismissed from the service. An Army captain was convicted by court-martial and sentenced to be dismissed from the service, to a fine, and to imprisonment. One of the assignments of error was that the fine and the term of imprisonment were beyond the power of the court-martial to inflict because they were imposed after Carter had ceased to be an officer of the Army of the United States, and after he had ceased to be subject to the jurisdiction of the court-martial. Thus, the petition squarely raised the issue of continuing military jurisdiction subsequent to a discharge or dismissal from the service when imposed in conjunction with a term of imprisonment. The Court held that Carter's view of his status was not well taken (183 U. S. at 383):

> The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such, which included not

---

[11] Petitioner dismisses *Craig* as of little value because allegedly the court there ruled as it did because of an assumed lack of power to declare Congressional enactments invalid (Pet. Br. 9). Not only the excerpts from the opinion quoted above, but also the following specific language by the court, bely that assertion (70 Fed. at 970-971): "It cannot be said that, by authorizing a trial by courts-martial of persons confined in the military prison established at Fort Leavenworth, for offenses committed while so confined, congress has clearly, *or even probably*, exceeded its powers." (Emphasis added.)

> only the power to hear and determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.
>
> He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court martial under the rules and articles of war. Rev. Stat. § 1361.

Petitioner draws comfort (Pet. Br. 12–14) from the difference that Carter's sentence of imprisonment was pronounced together with that directing his dismissal, while here we are concerned with a second crime, committed after service of the sentence had begun. The fact is, however, that at least one of the principles upon which the doctrine of continued military jurisdiction over military prisoners rests is that of a continuing relationship between the military and the serviceman, in line with the general legal principle that once jurisdiction has attached it continues until all of its aspects have been exhausted (*i. e.*, in this type of case, until the military no longer have control). See *Coleman* v. *Tennessee*, 97 U. S. 509; and see the opinions in *Wildman* and *Craig*, *supra*, pp. 16–18. That principle was sustained in the *Carter* case. Moreover, petitioner's view does not take into account the very specific language in *Carter* to the effect that military courts have jurisdiction of all offenses committed during confinement, *supra*. That

language was of course consistent with, and reconfirmed by, the holding in *Kahn*.[12]

Countering these decisions which explicitly upheld the constitutionality of the predecessor of Article 2 (e), petitioner cites Winthrop as viewing the statute as unconstitutional (Pet. Br. 10–11). Undoubtedly

---

[12] Petitioner mistakenly relies upon *United States* v. *Speller*, 24 C. M. R. 178, a decision of the United States Court of Military Appeals. Speller, an aviation cadet, was convicted on two specifications of housebreaking and sentenced to forfeiture of $74 per month for six months. Before any action could be taken by the reviewing authority, he was administratively released from active duty and transferred to the reserves. A question subsequently arose as to whether jurisdiction remained to complete the appellate processes and to execute Speller's sentence, in light of the fact that he had been administratively released from active duty prior to the start of that process. The court not only answered the question in the affirmative, but it went on to say that, under *Toth* v. *Quarles*, 350 U. S. 11, only after the service relationship terminates must the offender be tried in a civilian court. It contrasted the *Toth* situation with that existing in *Carter* and *Speller*, thus sharply illuminating the distinction between *Carter*, *Kahn*, and the instant type of case, on the one hand, and *Toth*, on the other. That distinction lies in the fact that in the first group a service-relationship or connection existed at the time the offense was committed and remained unbroken to the time of the court-martial. In *Toth*, on the other hand, a civilian "gap" existed which prevented reattachment of jurisdiction once the military had lost it. Interestingly enough, in *Speller*—upon which petitioner so heavily relies—the court held that military jurisdiction survived in circumstances showing a complete separation from the service, and even the dissenting judge understood that jurisdiction is not lost where the change of status results from a court-martial prosecution (24 C. M. R. at 180) and that the claim of continuing jurisdiction would be supported where the discharge was the result of a court-martial sentence (24 C. M. R. at 180, 181).

this was Winthrop's belief." Winthrop, *Military Law and Precedents* 105 (Reprint 1920 ed.). But his analysis partakes of the same vice as petitioner's brief—it assumes the very point in issue. Winthrop assumed that a dishonorably discharged soldier serving a term of confinement in a military prison was fully a civilian, and could not be fairly said to be still a part of the military service. In view of all the factors militating against that conclusion (see *infra*, pp. 24 *ff*), it is not surprising that this Court, the lower federal courts, the Court of Military Appeals, the Congress,[14] and the Judge Advocate General's Office, have been unable to concur in it.[15]

Thus, when this Court decided *Kahn* v. *Anderson* early in 1921, it had before it an unbroken chain of

---

[13] But Winthrop does not rule out the possibility that the statute might be valid in time of war.

[14] After the abandonment of Leavenworth as the sole central military prison, Section 1361 of the Revised Statutes (Act of March 3, 1873, *supra*) became obsolete because it applied only to that military prison. By that time, soldiers under court-martial sentence were being held in various other places of confinement, principally at post stockades. New legislation became necessary to subject them, too, to the Articles of War. Section 5 of the Act of June 18, 1898, Chapter 469, 30 Stat. 483, 484, filled this gap. It provided that: "Soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice." Petitioner claims this statute passed Congress in spite of "repeated holdings by the Judge Advocate General and the Secretary of War" (Pet. Br. 16). This is not accurate; the Secretary of War requested the statute, H. Doc. No. 119, 55th Cong., 2d Sess.

[15] The Attorney General, too, saw no constitutional defect in the statute. 16 Op. Atty. Gen. 292 (1879).

legislative and judicial precedent indicating that the relationship between a prisoner of petitioner's class and the military forces is such that the prisoner may fairly be said to be still in the military service, and that accordingly Congress has the power to subject him to military jurisdiction.

(*b*). Since *Kahn*, the courts have occasionally reviewed the law, and again no dissenting voice has been raised to the correctness of the decision. In *Mosher* v. *Hudspeth*, 123 F. 2d 401 (C. A. 10), certiorari denied, 316 U. S. 670, the defendant committed an offense while confined pursuant to a court-martial sentence which included a dishonorable discharge. The court sustained the second court-martial conviction. Petitioner attempts to distinguish that case on the theory that, as of the time of the second trial, the discharge had not become final by confirmation of the reviewing authority. However, when Mosher again sought a writ of habeas corpus, claiming that his severance from the military took place prior to time of trial for the second offense, *Mosher* v. *Hunter*, 143 F. 2d 745 (C. A. 10), the court not only recognized that the earlier case disposed of all the issues presented and that the earlier decision was amply supported by the authorities,[10] but went on to state:

---

[10] Petitioner is incorrect in his statement that the second *Mosher* case gave a different date from the first *Mosher* case as to the time of approval of the sentence of dishonorable discharge. (Pet. Br. 21). Both cases give May 24, 1920, as the date of approval by the Commanding General, and both cases state that approval of the dishonorable discharge by the Office of the Judge Advocate General was on July 23, 1920.

> * * * however since we are again urged to specifically decide on what date the appellant became officially separated from the military service by force of the first judgment and sentence of the court-martial we deem it appropriate to particularize the immateriality of that particular question in the light of our decision in the former case [143 F. 2d at 746].

After discussing the authorities, the court concluded:

> It is thus clear that the date of the finality of his dishonorable discharge is immaterial since when on May 23, 1920, appellant escaped from the custody of the military authorities he had been tried, convicted, and was "under sentence adjudged by courts-martial," hence within courts-martial jurisdiction for offenses committed during this time [143 F. 2d at 746].

In *McDonald* v. *Lee*, 217 F. 2d 619 (C. A. 5), certiorari granted and remanded with directions to dismiss as moot, 349 U. S. 948, the Court of Appeals for the Fifth Circuit, too, specifically sustained the constitutionality of the statute subjecting dishonorably discharged military prisoners to trial by courts-martial. See also *Toth* v. *Quarles*, 350 U. S. 11, 14. In sum, over eighty years of direct precedent would have to be overturned before petitioner could succeed on this issue.

3. Even putting history and precedent to one side, Article 2 (e) should be upheld. Congress could validly conclude that the relationship between petitioner and the military is sufficiently close that he can be treated as still within the land or naval forces for court-martial

purposes. Unlike Mrs. Covert, he clearly was a full-fledged member of the armed forces, in the narrowest sense, prior to his court-martial, and he is still fully subject to military direction. Unlike Mr. Toth, who had returned to his home and was engaged in civilian pursuits at the time of his arrest, his connection with the military has, by his own admission, not been wholly severed. He concedes that "the military retained certain authority over him, including certain disciplinary authority, so long as he was confined in a military prison" (Pet. Br. 27).[17]

(*a*). The suggestion that a punitive discharge, together with a sentence to military confinement in a military prison or disciplinary barracks (as it has been called since 1915), severs all connection of the discharged person with the military, is not correct. One of the objectives of military punishment is to rehabilitate offenders to the point where they may be restored to active duty with a view to eventual honorable discharge. For example, 10 U. S. C. 1456 (1946 ed.), Act of March 4, 1915, Chapter 143, Section 2, 38 Stat. 1085—which was in effect at the time of petitioner's term of imprisonment[18]—authorized the Secretary of War to place in military training those offenders whose record showed that restoration to duty might

[17] Our position at this point is that Article 2 (c) is constitutional even if it be assumed that petitioner's dishonorable discharge became completely effective prior to the time the offense in question was committed, but see pp. 29–33 *infra*, for he was in custody of, and closely connected, albeit involuntarily, with the military establishment.

[18] A similar provision is found in 10 U. S. C. 3662–3663 (Supp. V).

be warranted. Such prisoners were organized into disciplinary companies and higher units, organized as infantry with noncommissioned officers. Military training was to be carried on within the confines of the disciplinary barracks. The Secretary of War was further authorized to remit unexecuted portions of sentences and restore to duty those prisoners who had not previously been discharged. Prisoners already discharged as part of their sentences could, upon written application, be re-enlisted and restored to duty. The re-enlistment was effective to revive the prisoners' enlistment contract for the period equal to that which was not served under the contract which was suspended by the dishonorable discharge. 10 U. S. C. 1457 (1946 ed.). This policy of restoring offenders to active duty is designed to promote the military security of the United States by the maintenance and furtherance of an efficient fighting machine within the land and naval forces. In such a program, continued military discipline obviously plays a highly important part.

Moreover, a dishonorably discharged prisoner is not only in the custody of the military, but he is supervised, clothed, fed, and instructed by military personnel. His life and surroundings are still military, his environment wholly military. Petitioner cites Judge Advocate General opinions and policy statements as indicating that the Army itself views dishonorable discharged soldiers as not soldiers for various purposes (Pet. Br. 24). The obvious answer is that, whatever label the Army chose to describe dishonorably discharged soldiers for the specific purposes it

then had under consideration, the military has never intimated that a dishonorably discharged soldier serving military confinement is not subject to court-martial jurisdiction, or is wholly a civilian. In the opinions cited by petitioner (6 Bull. J. A. G. March–April, 1947, § 423 (1), p. 66 and 5 Bull. J. A. G. April 1946, § 419 (2)), p. 93, where the question was whether or not the dishonorably discharged soldier in confinement could commit the military offenses proscribed by Articles of War 61 (absence without leave) and 65 (disobeying the orders of a non-commissioned officer), there was no indication that these prisoners were civilians not subject at all to court-martial jurisdiction. It is clear that all of the non-military offenses proscribed by the Articles of War, and at least some of the military offenses, can be committed by dishonorably discharged soldiers in confinement.[19] Furthermore, the statements contained in 1 Bull. J. A. G. 100 (Pet. Br. 24) that dishonorably discharged soldiers in confinement are not entitled to special service (*i. e.*, recreational) equipment, and are not, when killed by the enemy, entitled to be regarded as being in military service at the time of death, are consistent with the purpose of a dishonorable discharge. Such a discharge is punitive; its object in part is punishment. Its effect is to deprive the person of certain benefits; yet if he is in military confinement, the discharge may continue to require him to conduct himself within the framework of the

[19] The offense in *McDonald* v. *Lee*, 217 F. 2d 619 (C. A. 5), *supra*, p. 23, was disrespect toward a superior officer, in violation of Article 89, U. C. M. J., a military offense.

Articles of War or hazard the pains and penalties of a court-martial trial.

If petitioner's contention were sustained, the anomalous situation would result that dishonorably discharged prisoners held in military custody would be immune from normal military sanctions (including additional terms of confinement), while prisoners who had committed less serious offenses (and were not given the additional punishment of a dishonorable discharge, or whose dishonorable discharges were suspended during confinement) would be subject to the Articles of War while serving their sentences. Prisoners receiving a dishonorable discharge could flout authority (short of committing a crime cognizable by the civilian courts), and expect only ordinary prison discipline, while prisoners not so discharged would be subject to full military jurisdiction while in confinement. This would plainly create a difficult and unsettling problem in the administration of military penal and correctional institutions.[20]

(*b*). Those charged with the burden of administering discipline in the military establishment have long felt that continued military jurisdiction over discharged military prisoners is necessary, essentially for the

---

[20] Petitioner quotes (Pet. Br. p. 17) from H. Rep. No. 2132, 54th Cong., 1st Sess., p. 2, in support of his contention that Congress intended to give the military jurisdiction only for infractions of prison rules. But that report cannot be so read. Taking the view most favorable to petitioner, the report states that it was the purpose of the bill to maintain military jurisdiction over soldiers sentenced to dishonorable discharge and confinement, and that the "probability" was that the offenses so committed would be breaches of military discipline.

reasons detailed above. The Secretary of War, writing to Congress in support of the bill which became the Act of 1898 (see footnote 14, *supra*, p. 21), had this to say:

> The military prison has now been discontinued, and military prisoners who have been discharged from the service by virtue of their sentences, * * * are now serving their terms at military posts. There is, however, no law which subjects them to the discipline of trial by court-martial under the Articles of War, and an important means of making confinement an effective military punishment is, therefore, lacking. To announce to the prisoner that, no matter what he may do, he cannot have the term of his confinement extended is a direct encouragement to insubordination and must impair the effect of military imprisonment as an exemplary punishment. In order to remedy this evil, it is very desirable that there should be legislation declaring that soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice. [H. Doc. No. 119, 55th Cong., 2d Sess., p. 3, 1897.]

The Committee on Military Affairs, considering the proposed legislation, agreed with the Secretary of War's recommendation (H. Rep. No. 224, 55th Cong., 2d Sess., 2):

> It seems reasonable that, as the prisoner is in the custody of the military authorities while serving out a sentence, he should also be subject to the laws regulating military discipline. * * *

See also H. Rep. No. 2132, 54th Cong., 1st Sess. There has been no change in this position through the years since 1898.

4. Moreover, the total congressional court-martial scheme shows that a dishonorable discharge such as that given to petitioner is not a full severance from his military service, but that the discharged prisoner is viewed by Congress as still continuing in the service even in the technical sense.

Article 2 (e) specifically directs that all persons under sentence adjudged by court-martial shall be amenable to continued military jurisdiction.[a] On the other hand, the Articles of War permit the imposition of punitive discharges in conjunction with a sentence of confinement.[b] A natural reading of these two provisions is that Article 2 (e) suspends the full effect of a dishonorable discharge which is coupled with a term of imprisonment until that

[a] Petitioner suggests that the effect of this article is that a military prisoner serving his sentence in a civilian prison would be subject to the Articles of War. Whether or not this statute was meant to be that broad, and if it was whether or not it could withstand a constitutional test in that situation, is not before this Court. Petitioner was in a military disciplinary barracks when he committed the offense now in question. The Uniform Code of Military Justice, Article 2 (7), expressly limits jurisdiction to persons "in custody of the armed forces."

[b] The Articles of War under which petitioner was tried do not expressly provide for dishonorable discharge by general courts-martial (although there are references to such a discharge). See 10 U. S. C. 1484 (1946 ed. Supp. IV). Earlier Articles did so provide. Under Article 45, 10 U. S. C. 1516 (1946 ed.) (Article 56, U. C. M. J.) the President prescribes by Executive Order the maximum table of punishments.

term expires."[28] For, by providing in Article 2 (c) for courts-martial jurisdiction over persons confined under a prior court-martial sentence, Congress directed that punitive discharges could not and should not completely sever the serviceman's connection with the military establishment so long as he was serving a term of imprisonment imposed by court-martial. The court-martial process would not have power to separate such a serviceman completely from the service.

That the Congress took this view of the statutory scheme was made clear in connection with the 1898 Act, 30 Stat. 483, 484. That statute provided:

> * * * Soldiers sentenced by court-martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice.

---

[28] It may be argued that the military could refrain from giving, or executing, a dishonorable discharge until the accused's prison term has expired. But this overlooks the fact that a dishonorable discharge is a form of punishment. The deprivations of benefits which it imposed on the accused are to take effect immediately. Formal suspension of a punitive discharge is provided for by Article 52, 10 U. S. C. 1524 (1946 ed.). Its purpose is not to retain jurisdiction over the discharged soldier, but rather it is a discretionary power to be used in a manner similar to suspended sentence provisions in federal and state courts. If the punitive discharge is suspended, the deprivation of certain benefits incident to such discharge are also suspended during that period. In certain cases it is not deemed appropriate to suspend the discharge during confinement, while in others that discretionary relief is accorded.

The committee report indicated a clear intent to defer the full effect of a punitive discharge imposed under such conditions until after the expiration of the prisoner's sentence. H. Rep. No. 224, 55th Cong., 2d Sess., p. 2, declares:

> It seems reasonable that, as the prisoner is in the custody of the military authorities while serving out a sentence, he should also be subject to the laws regulating military discipline. *Furthermore, he should not be treated as absolutely discharged [from] the service until his term of imprisonment has expired. Dishonorable discharge, being a part of the sentence, ought not to be held to take full effect until the expiration of his term of imprisonment,* although the sentence would operate as a forfeiture of all pay and allowances. Section 4 therefore renders the law coherent. [Emphasis added.]

See also H. Rep. No. 2132, 54th Cong., 1st Sess., which was adopted by the later House Report.

This recital makes clear the meaning and the effect of a dishonorable discharge coupled with a term of confinement.[*] And while the language of the 1898 statute was changed in the 1916 revision, 39 Stat. 650–651,[**] there was no intent to change the statute in this respect. See S. Rep. No. 130, 64th Cong., 1st Sess., App., p. 38.

Accordingly, the rules and regulations which Congress has prescribed for the armed forces limit, by

---

[*] *In Ex parte Wildman, supra*, p. 16, the court clearly recognized this legislative scheme, and in part based its decision on this theory.

[**] "All persons under sentence adjudged by courts-martial." This language remained unchanged in the 1920 and 1948 amendments to the articles. 41 Stat. 787, 62 Stat. 604, 628.

necessary implication, the court-martial's power to sever the military connections of a dishonorably discharged person who must undergo confinement. Since Congress clearly directed that military personnel sentenced by court-martial to both dishonorable discharge and confinement shall remain subject to the Articles of War until released, no court-martial sentence can legally provide for a greater severance of the prisoner's relationship with the military and with military jurisdiction, lest it contravene this congressional mandate. The sentence of dishonorable discharge must be construed in the light of the congressional directive contained in Article 2 (e), and petitioner cannot claim to have been fully severed from the service until the end of his military confinement. No constitutional barrier prevents this Congressional suspension of absolute discharge from the military service until the end of military confinement; although he forfeits the rights and privileges of a regular soldier, the prisoner's connection with the military establishment continues to remain so close and direct (see *supra*, pp. 24–29) that his status can properly be viewed as another form of membership in the armed forces.[20]

On this view, petitioner was still *in* the service, even in the technical and literal sense, when he committed the offense at Camp Cooke for which he was court-mar-

[20] Congress plainly has the power to prescribe various types of membership in the armed forces, and the incidents of the different types of membership may be appropriately varied. Cf. *Mitchell* v. *Cohen*, 333 U. S. 411, 418; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Hendee*, 124 U. S. 309; *Hurley* v. *Crowley*, 50 F. 2d 1010 (C. A. D. C.).

tialed, and therefore clearly subject to court-martial jurisdiction.

II. PETITIONER'S OFFENSE WAS NOT COMMITTED "IN TIME OF PEACE"

Article 92 of the Articles of War provided (*supra*, p. 3) that the offenses of murder and rape committed within the geographical limits of the United States are not triable by court-martial if the offense was committed "in time of peace." Petitioner was tried for, and convicted of, a murder committed on June 10, 1949, at a military disciplinary barracks in California. It is his contention that on that date "time of peace" existed in the United States, as the phrase is used in Article 92, and that accordingly the court-martial had no jurisdiction to try, convict, and sentence him.

In resolving this issue, all constitutional problems must be put to one side. This is not a case of whether a statute meets the test of constitutionality under the war power. Where that is the issue, the courts may and do make some inquiry as to the facts underlying the Congressional or Presidential determination of the existence of a war or an emergency. Thus in *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 547, the Court stated that it did not have the "liberty to shut its eyes to an obvious mistake, when the *validity of the law* depends upon the truth of what is declared." (Emphasis added.) See, also, *Youngstown Sheet & Tube* v. *Sawyer*, 343 U. S. 579. Yet even in that type of case the courts look primarily to the political branches of the Government to determine

the existence of war or peace (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146), and the war power has been construed to constitute an effective underpinning to emergency legislation long after actual hostilities have ceased. *Ludecke* v. *Watkins*, 335 U. S. 160; *In re Yamashita*, 327 U. S. 1; *Stewart* v. *Kahn*, 11 Wall. 493, 507.

The constitutional extent of "war powers" is not at all involved in the present case because Congress could validly provide for court-martial trial of murders committed by servicemen in time of peace. Article 1, Section 8, Clause 14, gives Congress the power to make rules for the government and regulation of the land and naval forces, and this power is obviously not dependent upon the existence of a state of war nor is it limited to the trial of military personnel for purely military offenses."[11] The Fifth Amendment excepts from its proscriptions all cases arising in the land and naval forces. It also excepts cases arising in the militia in time of war or public danger. Accordingly, Congressional power extends over the militia only in times of war or emergency while its power is unlimited with respect to the "land and naval forces." See *Johnson* v. *Sayre* 158 U. S. 109. Indeed, in *Coleman* v. *Tennessee*, 97 U. S. 509, this Court described Congressional power with respect to the land and naval forces as "plenary". *Coleman* held that a

[11] In *Toth* v. *Quarles*, 350 U. S. 11, and *Reid* v. *Covert*, 354 U. S. 1, the Court indicated that the jurisdiction of courts-martial could be predicated only on clause 14, not on the war power.

predecessor of Article 92 did not endow courts-martial with exclusive, but only with concurrent, jurisdiction for the offense of murder, but the Court recognized that Congress could have provided for exclusive military jurisdiction had it so desired. See also *Dynes* v. *Hoover*, 20 How. 65, and *Ex parte Milligan*, 4 Wall. 2. The question was wholly a statutory one.

Similarly, the narrow point at issue here is whether the clause in "time of peace" as used in Article 92 should be read to mean the period of time following an official declaration of the end of a war, or a period of time following the cessation of actual hostilities. This is purely a statutory issue, not a constitutional one. All that is required is for the Court to determine what Congress meant in using the term "time of peace." And those who have hitherto had occasion to deal with the problem have viewed the statute as encompassing persons who, like this petitioner, committed the offense prior to the signing of a definite peace treaty.

A. THIS COURT HAS ALREADY HELD THAT "TIME OF PEACE" FOR THE PURPOSE OF ARTICLE 92 DOES NOT EXIST UNTIL COMPLETE PEACE IS OFFICIALLY DECLARED

1. As with respect to the issue discussed under Point I, *supra*, *Kahn* v. *Anderson*, 255 U. S. 1, is decisive. One of the contentions there made was that when the trial occurred, after the World War I armistice, it was time of peace, and therefore no jurisdiction existed under Article 92. The Court unanimously held (255 U. S. at 9):

> That complete peace, in the legal sense, had not come to pass by the effect of the Armistice

and the cessation of hostilities, is not disputable. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146. It is therefore difficult to appreciate the reasoning upon which it is insisted that, although the Government of the United States was officially at war, nevertheless, so far as the regulation and control by it of its army is concerned, it was at peace.

And it went on to state (255 U. S. at 9–10):

> Coming now to consider that question in the light (1) of the rulings in *Ex parte Milligan*, 4 Wall. 2; *Coleman* v. *Tennessee*, 97 U. S. 509; *Ex parte Mason*, 105 U. S. 696, and *Caldwell* v. *Parker*, 252 U. S. 376; (2) of the differences between the Articles of 1874 and those of 1916 showing a purpose to rearrange the jurisdiction of courts-martial; (3) of the omission of the qualification, "except in time of war," from the clauses of the latter articles conferring jurisdiction as to designated offenses, including those capital (Articles 92 and 93), and its retention in the article dealing with the duty of the military to deliver to the state authorities (Article 74), and (4) of the placing in a separate article (Article 92) of the provision conferring jurisdiction as to murder and rape and qualifying that jurisdiction by the words, "in time of peace," not used in the previous articles, we are of opinion that that qualification signifies peace in the complete sense, officially declared. The fact that the Articles of 1916 in other respects make manifest the legislative purpose to give effect to the previous articles as interpreted by the decided cases to which we have referred, at once convincingly suggests that a like reason controlled in adopting the

limitation, "except in time of peace," contained in Article 92. See *McElrath* v. *United States*, 102 U. S. 426, 438, where it was expressly decided that the limitation, "except in time of peace," on the power of the President to summarily dismiss a military officer, contemplated not a mere cessation of hostilities, but peace in the complete sense, officially proclaimed. Indeed, in that case it was pointed out that this significance of the words had received the sanction of Congress and had been made the basis for the adjustment of controversies depending upon the time when peace was established.

In the light of this unequivocal language and the reasoning which supports it, it is completely unrealistic to attribute to *Kahn* the intention to do no more than to hold that, as petitioner suggests (Pet. Br. 34), once jurisdiction attaches it persists until the completion of the sentence. Nor was the definitive interpretation of Article 92 in that case an off-hand expression of opinion based neither on reason or research. The Court, reviewing the history of the Articles of War, reasoned that the legislative purpose of the 1916 Articles was to give effect and meaning to the particular provisions involved, in the light of the decided cases.[28] And it pointed out that it had previously been decided that "time of peace" contemplated more than a cessation of hostilities but was

[28] Congress was concerned with this phase of Article 92 at the time of the first enactment of the Article in 1916 only to the extent that a discussion took place on whether there should be a peacetime limitation on the jurisdiction of courts-martial. The provision finally adopted, of course, contained the limitation. See S. Rep. No. 130, 64th Cong., 1st Sess., App., p. 88.

peace in the complete sense officially proclaimed. Indeed, in *McElrath* v. *United States*, 102 U. S. 426, the Court expressly held that the limitation on presidential power to dismiss summarily an officer "in time of peace" meant peace in its complete sense officially declared. 102 U. S. at 438.

2. When Article 92 was reenacted in 1948, the *Kahn* decision, which was then twenty-seven years old, was incorporated into the revision, under the familiar canon on reenactment of legislation construed by this Court.[9] And since the problem is solely a statutory one, there is no obstacle to full application of the traditional rule.[10]

B. "TIME OF PEACE" FOR ARTICLE 92 STILL MEANS COMPLETE PEACE OFFICIALLY DECLARED, AND THAT EVENT DID NOT OCCUR WITH RESPECT TO WORLD WAR II UNTIL APRIL 1952

The *Kahn* ruling was correct when decided, and subsequent history has confirmed its soundness and applicability to the present case.

1. In general, this Court has recognized that, even for constitutional purposes, cessation of hostilities does not necessarily end a war. For instance, in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, the Court was faced with the validity of a statute prohibiting the sale of distilled spirits, which derived its vitality from the war power. The Act had been passed after the

---

[9] There was no discussion, at the time of the 1948 revision, of the phrase "in time of peace" in Article 92.

[10] Since the meaning which the *Kahn* case gave to the phrase "in time of peace" involved only a construction of the statute, "if it states a rule undesirable in its consequences, Congress can change it." *Screws* v. *United States*, 325 U. S. 91, 112–113.

signing of the armistice ending hostilities in World War I and it was contended that the war power could not sustain the statute. Notwithstanding the fact that an armistice had long been in effect and that hostilities had ceased, the Court, in an opinion by Mr. Justice Brandeis, concluded that the Act, which was less related to the maintenance of military activities during the post-armistice pre-treaty period than the instant statute, was an effective exercise of Congressional war power. In *Ludecke* v. *Watkins*, 335 U. S. 160 the statute gave the President the power to remove alien enemies. Again, the question was whether such power could survive the cessation of hostilities. Although World War II hostilities had clearly ended when the case arose, the Court sustained the Presidential action (335 U. S. at 166–169):

> Nor does law lag behind common sense. War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. * * * "The state of war" may be terminated by treaty or legislation or Presidential proclamation. *Whatever the mode, its termination is a political act.* * * * Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled. [Emphasis added].

See also *Woods* v. *Miller*, 333 U. S. 138; *Knauff* v. *Shaughnessy*, 338 U. S. 537.

2. The political branches have recognized their responsibility for declaring the end of a war and for terminating wartime enactments. Various methods may be, and have in the past been, employed to signal a war's official termination. The war may be terminated by treaty, or by legislation, or by Presidential proclamation. *Ludecke* v. *Watkins, supra.* When a war is thus terminated, legislation limited to the time of war dies. On the other hand, such legislation may be specifically terminated prior to the official end of the war. And with respect to pre-treaty termination, wartime laws expire in one of two ways: (1) in a wholesale manner, by Presidential proclamation or other executive or legislative act terminating the state of war, or (2) by a selective repeal or termination of statutes no longer meeting the requirements of the situation existing subsequent to the cessation of hostilities but prior to the official end of the war.

(*a*). The first approach was tried in the wake of World War I. Congress was then confronted for the first time on so colossal a scale with the need for shifting a society geared for the prosecution of an all-out war to a peacetime basis. At first, it attempted to meet this task by a blanket termination of wartime legislation (H. J. Res. 327), but this was vetoed by the President. See 59 Cong. Rec. 7747, 7805, 7808. Thereafter, following only a cursory and superficial examination of the laws involved, most of the legislation dependent upon the existence of a state of war was terminated or repealed. 41 Stat. 1359; (H. J. Res. 382); H. Rep. No. 1111, 66th Cong., 3d Sess.,

1920; S. Rep. No. 706, 66th Cong., 3d Sess., 1921. Some specific statutes were mentioned in the debates but no attempt was made to consider each statute. See 60 Cong. Rec. 290.

It is significant that the form of the terminating resolution after World War I was a blanket termination of statutes depending on the war, coupled with a short list of *excepted* statutes which were not to be affected by the resolution. In this form, the World War I resolution raised some question as to its effect on permanent legislation effective only in "time of peace". The Secretary of the Navy requested clarification from the Attorney General as to certain statutes containing the clause in "time of peace". The Attorney General, concluding that the resolution terminated the statutes in question, stated (32 Op. Atty. Gen., 505, 509–510):

> the terms "state of war," "state of peace," "time of war," "time of peace," are mutually exclusive and exhaust the categories. A "state of war" is the absence of a "state of peace," "a time of war" is the absence of a "time of peace" and vice versa. To affirm the one is to deny the other. When, then, the *proper authority* affirms that a legal state of war has begun, exists, or has terminated, it denies, by necessary implication, those qualities as to a state of peace. * * *
>
> * * * * * *
>
> In my opinion this same reasoning is applicable where, as in the joint resolution of March 3, 1921, the proper authority affirms the termination of a state of war, not for all purposes, but so far as concerns Acts of Congress dealing with

> internal affairs. It is true that the field with which the joint resolution purports to deal is limited, and is, as it were, carved out of the whole field of a state of war existing for all purposes. Nevertheless, in that limited field it is just as impossible to conceive of a state of war terminating without a state of peace beginning, just as impossible to conceive of a period of time which has ceased to be a time of war and yet has not become a time of peace, as it is in the larger field of a state of war for all purposes * * *. [Emphasis added.]

In short, the resolution was viewed as terminating all permanent legislation not excepted, whether or not it related to "time of peace" or "time of war."

(*b*). A totally different approach was employed after World War II. Although resolutions were introduced in 1945 which would have terminated the state of war immediately, no Congressional action was taken at that time. Instead, Congress conducted an investigation of the problems involved in making the transition from war to peace. See Hearings Before Subcommittee No. 4 of House Committee on Judiciary, On Cessation of Hostilities, Termination of the War and Emergencies, 79th Cong., 1st Sess. (1945); *id.*, 79th Cong., 2d Sess. (1946). The conclusion drawn by the committee was markedly different from the initial Congressional sentiment after World War I, in spite of vigorous support for a blanket termination of wartime legislation. After a prolonged and detailed study of the

> four-hundred-odd war, hostilities, and emergency statutes * * * it was concluded that

certain of the statutes, effective during a state of hostilities, war, or emergency, must be continued in effect in order to properly carry out the objectives to be attained by both the military and civilian agencies of the Government, even though the so-called shooting period was concluded. It was likewise concluded that the hostilities, the war, and the emergencies cannot be terminated as to certain statutes and continued as to other statutes. Any blanket termination should apply to all statutes and powers or to none at all. Therefore it is deemed inadvisable at this time to take any action on the termination of hostilities, the war, or the emergencies."[21]

The committee appended to its report a list of wartime statutes which were recommended for immediate repeal or termination. *Id.* at 3–15. Article 92 is significantly absent, although at least one of the compilations of wartime statutes which was available to Congress when it was determining which statutes to render inoperative or repeal contained Article 92. Library of Congress Legislative Ref. Serv. Pub. Aff. Bull. No. 35, p. 89 (1945).

This piecemeal approach to the termination of wartime measures was probably prompted by the magnitude of the problem of shifting the United States to a peacetime economy, as well as a peacetime military establishment. In 1945, the President, in a message to Congress, indicated that the time had not yet arrived for a proclamation of the cessation of hostilities, much less a termination of the war. He stated

[21] H. Rep. No. 2682, 79th Cong., 2d Sess., p. 2 (1946).

that wartime statutes would remain in effect until a final state of peace had been restored unless a specific termination date was established by appropriate Government action with respect to any particular enactment. And he admonished Congress to draft with care any terminating legislation. 91 Cong. Rec. 8377, 8380. Attached to this message was a list of major wartime statutes prepared by the Department of Justice and transmitted to the President by the Attorney General. H. Doc. No. 282, 79th Cong., 1st Sess.

On December 31, 1946, the President proclaimed the *cessation of hostilities*—which had the effect of terminating some of the wartime measures appearing on the Attorney General's list. 61 Stat. 1048, 12 Fed. Reg. 1. Yet even here the President was quite careful to indicate that a state of war still existed.[*] The result of this Proclamation was that only certain specified statutes become inoperative. See S. Doc. No. 42, 80th Cong., 1st Sess., which lists the statutes terminated by this Presidential Proclamation.

The Congressional study concerning the termination of the war, begun in 1945, did not reach fruition until the next session of Congress. The problem was again studied during the 80th Congress and Senate Joint Resolution 123 was passed, listing several hundred war measures which were either repealed or rendered inoperative. Section 3 of the resolution stated that, for the purposes of interpreting the enumerated stat-

[*] "Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated." 61 Stat. 1048.

utes, the war was to be construed as having terminated as of the effective date of the resolution, 61 Stat. 449, 451 (July 25, 1947)." See, also, S. Doc. No. 42, 80th Cong., 1st Sess.; S. Rep. No. 339, 80th Cong., 1st Sess., Part 2; H. Rep. No. 799, 80th Cong., 1st Sess."

The Joint Resolution terminated numerous provisions of the Articles of War (Articles 2 (d), 48, 58, 59, 74–79, 104, 119). 61 Stat. 449, 452. But numerous other provisions of the Articles, which were either operative only in time of war or inoperative in time of peace, were not so affected."

It is clear from this history that Congress proceeded by way of a conscious and deliberate selection and

---

"Other statutes were repealed as of other dates (July 1, 1948; six months after the enactment of the joint resolution). 61 Stat. 451.

"Lists submitted during the previous session can be found in H. Doc. No. 282, 79th Cong., 1st Sess., 1945; Library of Congress Leg. Ref. Serv. Pub. Aff. Bull. No. 35, 1945.

"The following Articles of War were not rendered inoperative by the resolution. Articles: 39 (statute of limitations applicable to offenses except for desertion in "time of war"), 42 (places of confinement for non-military offenses—except for desertion in "time of war"), 45 (maximum penalties in time of peace limited), 70 (in time of peace no person brought to trial within five days of service of charges), 85 (officer drunk on duty, mandatory dismissal in time of war, discretion of court-martial in time of peace), 86 (death prescribed for sentinel drunk or sleeping on post in time of war), 92 (murder and rape limitation on court-martial jurisdiction in time of peace), 118 (no officer dismissed except by general court-martial in time of peace). The fate of Articles 80, 81, and 82 is not certain. See itemized list of provisions affected by the resolution, in H. Rep. No. 799, 80th Cong., 1st Sess., Appendix, p. 24.

elimination, which was in keeping with the President's request. 91 Cong. Rec. 8380. Moreover, the fact that the Joint Resolution listed certain Articles of War, and not others, indicates: (1) that Congress deliberately excluded certain provisions from the operation of the Resolution, among them Article 92, and (2) that Congress intended that the provisions not included should continue to be operative. It is also clear that Congress did not conceive that the war had come to an end at that time insofar as the Articles of War were concerned, since otherwise the specific act of terminating some of the war-time legislation, *including certain of the Articles of War*, would have been a useless and futile act."

3. Since the wartime clause of Article 92 was not earlier terminated by specific Congressional action, it remained operative and effective until the formal declaration of peace. With respect to World War II, the formal declaration of peace occurred on April 28, 1952, the effective date of the Japanese Peace Treaty.

The President reflected this fact by his Proclamation of April 28, 1952, 66 Stat. C31, in which he stated:

> the state of war * * * which was the last of the aforesaid states of war still existing, was terminated by the coming into force this day of the Treaty of Peace with Japan * * *.

Later, the President reiterated this view in his Proc-

" The Court has already expressly recognized that neither the Presidential Proclamation of 1946 nor the Joint Resolution of July 1947 terminated the state of war. *Woods* v. *Miller*, 333 U. S. 138, 140; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 546.

lamation (No. 3001) of December 24, 1952, 67 Stat. C. 24, in which he granted amnesty and pardon to persons guilty of the offense of desertion in time of war between August 14, 1945 and June 25, 1950. He stated:

> the last of the states of war existing at that time was not formally and legally terminated until April 28, 1952 * * *.

There can thus be no doubt as to what date was regarded by the Executive Branch of the Government as establishing peace, officially declared.

Congress, too, was clearly aware that officially declared peace for the purposes of the Articles of War did not arrive until the Treaty of Peace—on April 28, 1952. Aside from the history of S. J. Res. 123, discussed *supra*, pp. 44–46, there is other legislative material to this effect. In 1948, Congress substantially amended the Articles of War, including Article 92. The legislative history of the 1948 revision shows that Congress contemplated that a state of war still existed when that revision was adopted. For example, Article 53, which was entirely new, provided that those convicted by court-martial could petition for a new trial within one year after final disposition of the case or one year after termination of World War II, whichever was later. See Hearings Before the Subcommittee of the House Committee on Armed Services on H. R. 2575, To Amend the Articles of War, Etc., 80th Cong., 1st Sess., 2121, 1947. It would have been absurd for Congress to have enacted this provision in 1948 had it regarded the war as having terminated prior to that date.

Even as late as 1949, when the Uniform Code of Military Justice was being considered, specific attention was given to Article 53. While the World War II proviso was eliminated from the permanent legislation, the Article was reenacted in 50 U. S. C. 740 (1952 ed.), which declared that with respect to World War II cases the termination date of the war would be May 31, 1951. Mr. Larkin, one of the special committee members who drafted the Code, testified that some provision should be made for a cut-off date for the World War II cases "because the war is not over yet." He stated further that:

> Cases currently tried are construed to come within the additional time limit you have in that proviso, and I do not know but what there should be a distinction between the 1 year petition for fraud and newly discovered evidence, starting with cases that are tried under this new code whenever it becomes effective and the petition as to all of the cases that are still within the war period, the war not having terminated and the cases being tried today coming under that provision. [Hearings Before Subcommittee No. 1 of the House Committee on Armed Services, Uniform Code of Military Justice, 81st Cong., 1st Sess., 1215 (1949).]

Congress was fully aware, not only when it amended the Articles of War in 1948, but when it enacted the Uniform Code in 1950, that, at least for these purposes, the war had not yet terminated.

Thus, it is apparent that events since 1921—particularly the subsequent legislative history of Article 92 and of the 1948 and 1950 amendments to the court-

martial statutes—offer no reason to depart from the construction given to the phrase "in time of peace" in *Kahn*. Indeed, the history affirmatively indicates that Congress accepted and intended to perpetuate the *Kahn* rule.

4. Petitioner contends, however, that the concept of the *Kahn* case is in conflict with several decisions of the United States Court of Military Appeals (Pet. Br. 31, 35–38). His argument is that these cases demonstrate that, for the purpose of construing the phrase "in time of war" or "in time of peace", the courts will make a *de novo* determination, irrespective of the declarations of the political branches of the Government. First, it should be pointed out that the cases which he cites are of extremely limited application. The armed conflict there involved was the so-called Korean war. United States military participation in this conflict commenced without a formal declaration of war; it was initiated pursuant to treaty obligations concerning and under the auspices of the United Nations. In the absence of a formal declaration of war, no formal declaration of peace was necessary or even possible in that specialized situation.

Even with these qualifications, the rulings of the Court of Military Appeals are not in conflict with the decision below. In *United States* v. *Ayers*, 4 U. S. C. M. A. 220, 15 C. M. R. 220, the court dealt with a situation in which a soldier had been convicted during the Korean conflict of being absent without leave in time of war. The court recognized specifically that the Article dealing with desertion in time of war did not become inoperative for World War II pur-

poses until it was so rendered by S. J. Res. 123, *supra*, p. 45, in 1947. The court then indicated (see Pet. Br. 31) that the purpose of the particular Article should be considered, because this approach was dictated by Congressional precedent after World War II. The opinion stated (15 C. M. R. 227–8):

> Upon the termination of actual hostilities in World War II, Congress indicated unmistakably that it wished the War to terminate for certain purposes, but allowed it to remain in effect for others. Our concern in coping with this and other legal problems arising out of the Korean situation must be with determining as a matter of interpretation whether, within the framework of Congressional intent, war existed for the purposes of the specific provision under consideration.

This view is further elucidated in *United States* v. *Shell*, 7 U. S. C. M. A. 646, 23 C. M. R. 110, in which the court had to deal again with a conviction for desertion in time of war, and in which it concluded that for purposes of the particular Article the Truce Agreement between the United Nations command and the enemy command signaled the termination of the war. Said the court (23 C. M. R. at 114):

> Manifestly, if, *in the absence of formal Executive or Legislative action*, a collection of factors compels a conclusion that a state of war is being maintained, when those factors or a substantial part thereof no longer exist, a contrary deduction may be required. [Emphasis added.]

There would appear to be little doubt that, had Congressional action and intent been as specific as it was

after World War II, the court would not have decided the question of the war's end for itself. In deciding a question of interpretation in the face of Congressional silence, courts will often rest their determination on the basis of factors which reveal the probable intent. But if legislative intent is expressed by the political branches, as it was after World War II, the court need not and should not go any further. *Ludecke* v. *Watkins*, 335 U. S. 160, 170.

In short, the decisions of the Court of Military Appeals cited by petitioner are of scant assistance to him. Not only do they arise from an unusual historical situation, but, even more, their basic theory is in accord with the concept that courts will not independently view the facts to determine whether or not war has ceased, but will look to the political branches for that determination. Where the political branches refrain from making a formal declaration, various factors are considered by the courts, so that some indication of the political view and intent can be deduced. But that is not true where the political branches have themselves borne the responsibility of determining the status of war and peace. And the extreme care with which both political branches approached this problem in World War II (*supra*, pp. 42–49) demonstrate that their purpose was to keep all wartime legislation, which was not specifically repealed or terminated, in full force and effect until automatically ended by the final treaty of peace or formal termination of the war—which finally occurred on April 28, 1952. Since the wartime operation of Article 92 was not terminated

by Governmental action prior to the establishment of an official state of peace, the only conclusion which can be drawn is that, but for the fact that the Uniform Code of Military Justice became effective on May 31, 1951, the wartime phase of Article 92 would have expired only on April 28, 1952.

CONCLUSION

For the reason stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.
W. WILSON WHITE,
Assistant Attorney General.
HAROLD H. GREENE,
D. ROBERT OWEN,
Attorneys.

OCTOBER 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958